Nos. 95-1128, 95-1138

Supreme Court U.S.
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In The

Supreme Court of the United States

October Term, 1995

PHILADELPHIA REINSURANCE CORPORATION, *et al.*,

Petitioners,

-and-

UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S, *et al.*,

Petitioners,

vs.

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court may vacate an arbitration award rendered in a consolidated proceeding by reversing a prior order of the court consolidating the arbitration where there has been no intervening change in the controlling law, the party challenging the consolidation failed to exercise its right to take an immediate appeal from the consolidation order, and a balancing of the equities weighs in favor of allowing the award to stand.

2. Whether an order compelling arbitration on a consolidated basis *may* be appealed immediately when it arises in an independent proceeding brought solely to compel arbitration and seeking no relief on the merits of the dispute.

STATEMENT UNDER RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent The North River Insurance Company states that at all relevant times its ultimate parent, Xerox Corporation, issued shares to the public.

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Respondent The North River Insurance Company ("North River") respectfully submits this brief in opposition to the petitions for a writ of certiorari which seek the review of a decision of the United States Court of Appeals for the Second Circuit. That decision is reported at 63 F.3d 160 (2d Cir. 1995) and is reprinted in both petitions at Appendix A.

STATEMENT OF THE CASE

This case concerns the Second Circuit's straightforward application of the well-established law of the case doctrine to the highly unusual facts before it. The Second Circuit reversed the District Court's vacatur of an arbitration award, which was based upon the District Court's erroneous decision to reverse an earlier order compelling the parties to proceed with an arbitration on a consolidated basis, holding that the District Court had no reasonable basis to depart from the law of the case doctrine to revisit its consolidation order and unravel a two-year arbitration proceeding. In reaching its decision, the Second Circuit emphasized the unique circumstances of this case, namely that: (1) the arbitration ordered by the District Court to proceed on a consolidated basis had already been concluded, following two years of exhaustive discovery and a four-day hearing; and (2) Petitioners chose not to appeal the District Court's consolidation order -- even though it was immediately appealable -- and instead challenged the order only after an arbitration award had

been entered against them.[1] The unusual nature of this case, by itself, demonstrates that the Second Circuit's decision is not an appropriate decision for review by this Court.

A. Arbitration Proceedings

In the arbitration proceedings, North River sought reimbursement from the Reinsurers for their share of millions of dollars in asbestos losses due and owing under a single reinsurance treaty program.[2]

During the period 1984 through 1986, North River paid $15 million for asbestos claims on behalf of its insured, the GAF Corporation ("GAF"), pursuant to a three-year umbrella liability policy that was in turn

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[1] The domestic Petitioners (Philadelphia Reinsurance Corporation, Assicurazioni Generali, Excess and Casualty Reinsurance Association, and The Reinsurance Corporation of New York) will be referred to as the "U.S. Reinsurers." The foreign Petitioners (Certain Underwriters at Lloyd's, London and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939) will be referred to as the "London Reinsurers." They will be referred to collectively as the "Reinsurers."

[2] A reinsurance treaty -- one of the two basic forms of reinsurance contracts -- involves an ongoing contractual relationship between two or more insurers in which one agrees in advance to cede, and others to accept, specified business that is the subject of the contract. Under a treaty, the reinsurer agrees to indemnify the ceding insurer with respect to a "book" of the ceding insurer's underwriting activities for designated lines of business; such reinsurance arrangements typically involve the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

reinsured under a treaty program. (A615-16).[1] North River billed its reinsurers for their participating shares of the losses under the treaty program. Seven of the twelve reinsurers paid their share of the GAF loss, consistent with their contractual obligations. The U.S. Reinsurers and the London Reinsurers, who were participants in the same treaty program, refused to pay their shares. (A617-18).

The treaty program subscribed to by the Reinsurers contained a single arbitration agreement applicable to all the participating reinsurers. (A615-16). In accordance with the arbitration agreement, North River commenced arbitration proceedings in December 1988 against the U.S. Reinsurers to collect reinsurance for the GAF losses. North River later commenced an arbitration in October 1989 against the London Reinsurers, pursuant to the same arbitration agreement. (A618).

In the two arbitrations, the parties selected the same two party-appointed arbitrators. (A618). For months, the two arbitrators attempted to select a third arbitrator to act as an umpire. On October 31, 1990, after the arbitrators reached an impasse over the selection of an umpire, North River commenced an independent proceeding in the District Court pursuant to sections 4 and 5 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 4-5 (1988 & Supp. 1993), seeking an order consolidating the arbitration against the U.S. Reinsurers with the arbitration against the London Reinsurers, appointing an umpire to complete the

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[1] Citations with the prefix "A" refer to the Joint Appendix filed with the Second Circuit.

panel and compelling the Reinsurers to proceed with the arbitration on a consolidated basis. (A619).

The District Court consolidated the arbitrations in May 1991 based upon the Second Circuit's decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) ("*Nereus*"), *cert. denied*, 426 U.S. 936 (1976), and set forth a procedure for the selection of an umpire. In an order dated July 19, 1991 (the "July 1991 Order"), the District Court appointed an umpire and directed the parties to proceed with the arbitration on a consolidated basis. (A619). The Reinsurers chose not to appeal the July 1991 Order compelling arbitration on a consolidated basis -- even though it arose in an independent proceeding and was, therefore, a final appealable order -- opting instead to go forward with the arbitration.

In reliance upon the District Court's July 1991 Order and in accordance with a schedule approved by the arbitration panel, the parties expended substantial resources in conducting extensive joint discovery during the period October 1992 through April 1993. Discovery included production by the parties of approximately 11,500 pages of documents, production by non-parties of approximately 5,500 pages of documents, and 23 depositions of party and non-party witnesses taken in New York, Florida, Bermuda and London. (A619-20). After the close of discovery, the parties submitted to the panel extensive pre-hearing briefs, together with 254 pre-marked exhibits. (A620).

The parties presented their cases to the arbitrators during a four-day hearing from July 9 through July 12, 1993. North River called three witnesses and submitted

the deposition testimony of three witnesses. The U.S. Reinsurers called five witnesses and submitted the deposition testimony of five witnesses. The London Reinsurers called two witnesses and submitted the deposition testimony of one witness. (A621). At the conclusion of the hearing, the evidence of record consisted of the testimony of 19 witnesses and 338 exhibits.

Two weeks before the arbitration hearing, the Second Circuit issued its decision in *Government of the United Kingdom of Great Britain v. Boeing Company* ("*Boeing*"), 998 F.2d 68 (2d Cir. 1993).

After deliberating for more than one month following the conclusion of the hearing, the arbitration panel issued its award on August 21, 1993, finding in favor of North River on all counts and awarding North River the total sum of $2,636,000, plus interest. (A621, A491-96).

The District Court later concluded that the *Boeing* decision rendered the consolidated arbitration a nullity.

B. Post-Award Proceedings

The Reinsurers refused to pay the arbitration award, forcing North River to move in the District Court for confirmation of the award on October 28, 1993. (A486-89). The Reinsurers opposed North River's motion to confirm and cross-moved to vacate the award. By Memorandum Opinion and Order dated July 13, 1994, the District Court (Haight, J.) denied North River's motion to confirm and granted the Reinsurers' cross-motions to

vacate, remanding the proceedings for separate arbitrations *de novo*. (Pet. App., 24a).[4]

The District Court held that the Second Circuit's decision in *Boeing* had changed the controlling law as to the consolidation of arbitration proceedings and that, as a result, it must depart from the law of the case doctrine and reverse the earlier July 1991 Order. (Pet. App., 19a-23a). Thus, the District Court vacated the arbitration award and ordered the parties to proceed in two separate arbitrations, despite the fact that the Reinsurers had not challenged the District Court's July 1991 Order until *after* they lost the arbitration.

The Second Circuit reversed, holding that the District Court abused its discretion in vacating the earlier order compelling arbitration under the "intervening change in the law" exception to the law of the case doctrine. The Second Circuit found that the District Court lacked a reasonable basis to depart from the law of the case doctrine because: (1) there had in fact been no intervening change in the controlling law, based upon the *Boeing* decision, under the circumstances of this case (Pet. App., 10a); (2) "extensive discovery" had been conducted in the consolidated arbitration and "the arbitration proceedings have been completed," (Pet. App., 11a); and (3) the Reinsurers "chose not to challenge the consolidation on direct appeal," (Pet. App., 11a), even though the "district court's order compelling arbitration on a consolidated basis

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[4] Citations to "Pet. App." refer to the identical Appendices attached to the Reinsurers' petitions.

was a final order and was immediately appealable," (Pet. App., 7a).

In September 1995, the Reinsurers filed petitions for rehearing and rehearing in banc. The Second Circuit denied those petitions on October 18, 1995 and issued a mandate on October 25, 1995 reversing the District Court's decision and remanding this matter for further proceedings. (Pet. App., 31a-34a).

SUMMARY OF REASONS FOR DENYING WRIT

The Reinsurers have utterly failed to meet their burden of demonstrating that there is a "compelling reason" for this Court to review the Second Circuit's decision. They have not shown that the highly unusual situation presented in this case is likely to recur or that the Second Circuit's limited holding has broader implications. The Reinsurers also have not pointed to any true conflict between the Second Circuit's decision and precedent from this Court or other circuits, nor have they established that there is a federal question here which should be settled by this Court.

The Second Circuit expressly based its decision on the unique factual circumstances of this case. It held that the District Court abused its discretion in departing from the law of the case doctrine largely because the costly, time-consuming arbitration had already proceeded to conclusion and because the Reinsurers challenged the District Court's July 1991 Order only after an arbitration award was entered against them, even though they had the right to immediately appeal that decision two years earlier.

Given that the Second Circuit's decision was grounded in the unusual set of facts present here, which are unlikely to be repeated, it is not an appropriate decision for review by this Court.

The Reinsurers, in an effort to create a conflict for this Court to resolve, misconstrue the Second Circuit's decision. They mistakenly interpret the Second Circuit's decision as holding that a district court may, *at the very outset of a case*, order a consolidated arbitration absent the agreement of the parties. Such a holding, the Reinsurers assert, conflicts with cases from this Court and other courts of appeals. The Second Circuit, however, held only that in the unusual situation presented by this case -- where no timely appeal was taken from the order compelling arbitration on a consolidated basis, an arbitration had taken place and an award had been rendered -- proper application of the law of the case doctrine and consideration of the balance of equities weighed strongly in favor of allowing the arbitration award to stand. The Second Circuit never reached the broader issue posed by the Reinsurers in their petitions, *i.e.*, whether a district court, in general, may invoke its equitable powers to order consolidation in the first instance, *before* an arbitration has occurred. Thus, there is no conflict with precedent and no need for review by this Court.

The U.S. Reinsurers also claim that the Second Circuit ignored precedent regarding the law of the case doctrine. The Second Circuit, however, correctly followed decisions from this Court holding that a district court may revisit an earlier order only to correct a "clearly erroneous" ruling *and* to prevent "manifest injustice." The Second Circuit stated that there was no clear error in this case

because the controlling law in the Second Circuit had not changed after the order compelling arbitration was entered. The Second Circuit similarly found that no "manifest injustice" would result if the arbitration award were allowed to stand. To the contrary, it concluded that the balancing of the equities involved, including the fact that the Reinsurers chose not to appeal the District Court's July 1991 Order directly, strongly favored confirmation of the award. Thus, the Second Circuit's decision was merely an application of recognized and settled law of the case precedent. Because this Court generally will not review the application of a properly stated rule of law, the Second Circuit's holding on the law of the case doctrine cannot serve as a basis for granting certiorari.

Equally unavailing is the U.S. Reinsurers' contention that the Second Circuit's decision undermines the ability of a district court, pursuant to section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4) (1988 & Supp. 1993), to vacate an award when the arbitrators exceed their powers. The Second Circuit did not even address the power of a district court in such situations. Instead, it held that where, as in this case, the equities weigh against the reconsideration of a prior order, section 10(a)(4) cannot be used as an alternative basis for departing from the law of the case doctrine. Therefore, the Second Circuit did not limit a district court's power under the FAA, and there is no conflict between the Second Circuit's decision and precedent construing section 10(a)(4).

The U.S. Reinsurers' final argument is that the Court should grant certiorari in order to clear up the "confusion" among the circuits concerning the appealability of an order compelling arbitration. Simply put, no such

confusion exists. The vast majority of the courts of appeals (including the Second Circuit) have adopted a bright-line test for appealability based on whether the order arises in an "independent" or "embedded" proceeding. The independent-embedded test is both widely and consistently applied, as is illustrated even by the cases cited in the U.S. Reinsurers' petition.

In sum, the Reinsurers have not shown that the Second Circuit's decision involves recurring issues of importance, conflicts with precedent from this Court or from other courts of appeals, or implicates the Court's power to settle important federal questions. Accordingly, the Reinsurers' petitions for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

Standard for Granting Writ of Certiorari

The rules of this Court state that a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. In general, certiorari will be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the episodic"); 13 James W. Moore, ed., *Moore's Federal Practice* ¶ 810.21 at SC10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law,"

Sup. Ct. R. 10. Moreover, certiorari will be granted "only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority'" between the courts of appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). Finally, the Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the court of appeals internally. *See, e.g., Taylor v. U.S.*, 493 U.S. 906, 906 (1989); *Davis v. U.S.*, 417 U.S. 333, 340 (1974); *Wisniewski v. U.S.*, 353 U.S. 901, 902 (1957).

POINT I

NO CONFLICT EXISTS BETWEEN THE SECOND CIRCUIT'S DECISION AND PRECEDENT FROM THIS COURT AND OTHER COURTS OF APPEALS

A. The Second Circuit Held Only That in the Special Circumstances Before It the District Court Had No Reasonable Basis to Depart from the Law of the Case Doctrine

According to the Reinsurers, the Second Circuit held that a district court may use its equitable powers to order a consolidated arbitration absent the agreement of the parties. Petition of U.S. Reinsurers ("USR Pet.") at 15-16; Petition of London Reinsurers ("LR Pet.") at 9. The Reinsurers contend that this supposed "holding" conflicts with *Volt Info. Sciences v. Board of Trustees*, 489 U.S.

468, 478 (1989), *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("*Byrd*"), and cases from other courts of appeals which state that a district court may enforce arbitration agreements solely in accordance with their terms. USR Pet. at 7-8, 10-11; LR Pet. at 6, 9-10.

The Reinsurers' argument, however, is based upon a fundamental misreading of the Second Circuit's limited holding. The Second Circuit did not address the issue of whether a district court may order a consolidated arbitration *in the first instance* on a motion to compel, absent the parties' agreement. Rather, the Second Circuit considered "whether equitable principles allow for the confirmation of an award in a consolidated proceeding *already had*." (Pet. App., 10a (emphasis added)). The Second Circuit noted that its opinion in *Government of the United Kingdom of Great Britain v. Boeing Company* ("*Boeing*"), 998 F.2d 68 (2d Cir. 1993), was consistent with this Court's precedent, but had left undisturbed the "general equitable powers of the court." (Pet. App., 10a). The Second Circuit then applied *Boeing* to the highly unusual circumstances present here, concluding that:

> [T]he equities *in this case* require that the award from the consolidated arbitration stand. Extensive discovery has already been had in the consolidated case, and the arbitration proceedings have been completed. The [Reinsurers] chose not to challenge the consolidation on direct appeal.

(Pet. App., 11a (emphasis added)).

There are, therefore, two reasons why this Court should not review the Second Circuit's decision. *First*, the decision turned on a set of facts which are unique and not likely to be repeated. In fact, our research reveals that of the cases cited by the *Boeing* court as illustrations of consolidation under *Nereus*, *see* 998 F.2d at 71 n.1, it was only in this case that the District Court revisited and reversed the consolidation order. This Court has stressed that it will not review a case if it presents an "episodic" problem or involves an issue "unlikely to recur." *Rice*, 349 U.S. at 74; 13 *Moore's Federal Practice* ¶ 810.21 at SC10-23. This is clearly such a case.

Second, the conflict alleged by the Reinsurers does not in fact exist. The Second Circuit's decision cannot be in conflict with *Volk*, *Byrd* and the other cases cited by the Reinsurers because those cases dealt with an issue never presented in this case, *i.e.*, whether a district court may order a consolidated arbitration, absent the parties' agreement, before an arbitration has taken place. That would have been the issue presented to the Second Circuit had the Reinsurers taken a direct appeal of the July 1991 Order, as was their right, before the arbitration proceeded to conclusion. That is not what occurred, and the Second Circuit expressly limited its decision to the situation at hand, namely a collateral attack on the consolidation order after the arbitration had already been conducted.[2]

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[2] Rather than pointing to any real conflict, the Reinsurers are essentially disagreeing with the Second Circuit's application of the clear language in *Boeing* to the unique facts of this case. This Court, however, will "rarely" grant certiorari where, as here, the asserted error consists of the misapplication of a properly stated rule of law. Sup.

(continued...)

Because the Second Circuit limited its holding to the unique facts before it and because the decision in no way conflicts with precedents from this Court or other circuits, the petitions for a writ of certiorari should be denied.

B. The Second Circuit Properly Applied Well-Established Law of the Case Doctrine in Holding that the District Court Abused Its Discretion

The U.S. Reinsurers also attempt to create a conflict by suggesting that the Second Circuit ignored law of the case precedent. USR Pet. at 19-21. Yet the Second Circuit's decision was nothing more than a proper application of long-standing, established law of the case precedent to the highly unusual facts and circumstances of this action. As such, it is not an appropriate decision for review.

This Court has stated that as a rule courts should be "loathe" to depart from the law of the case doctrine and revisit prior orders "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"

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[2](...continued)
Ct. R. 10. Moreover, to the extent that the Reinsurers have asserted that the Second Circuit's decision conflicts with other Second Circuit precedent, *see. e.g.*, USR Pet. at 7-8, LR Pet. at 2-3, this Court has held that such conflicts are best resolved by a court of appeals sitting in banc. *See Taylor*, 493 U.S. at 906; *Davis*, 417 U.S. at 340; *Wisniewski*, 353 U.S. at 902. Here, the Second Circuit denied the Reinsurers' efforts to have this matter reheard in banc. (Pet. App., 31a-32a).

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). The Second Circuit cited *Christianson* and applied it to this case, finding that the District Court abused its discretion because the required "extraordinary circumstances" were not present. (Pet. App., 9a-11a).

Turning first to the "clearly erroneous" prong of the two-part test set forth in *Christianson*, the Second Circuit pointed out that there had been no intervening change in the law rendering the District Court's July 1991 Order erroneous. The Second Circuit noted that *Boeing* did not "truly" change the law in the circuit because it was based on this Court's holdings in *Volt*, *Byrd* and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). (Pet. App., 10a). It further stated that *Boeing* had preserved the "general equitable powers" of the district courts. (Pet. App., 10a). Thus, the Second Circuit determined that *Boeing* did not require reversal of an order of consolidation *after* an award had already been rendered -- particularly where the party opposing consolidation could have immediately appealed the consolidation order but chose not to appeal -- because the equities weighed strongly in favor of permitting the award to stand.

The Second Circuit also concluded that the second, "manifest injustice" prong of the *Christianson* test had not been satisfied. Instead of finding that the District Court's order would work a "manifest injustice" if it were allowed to stand, the Second Circuit found that it would be manifestly unjust to vacate the arbitration award. According to the Second Circuit, the balancing of the equities -- which includes the Reinsurers' failure to take a direct appeal from the July 1991 Order as well as the fact

that the arbitration proceedings had already taken place at great expense and effort to the parties -- weighed strongly in favor of allowing the arbitration award to stand. (Pet. App., 10a-11a).[6]

The U.S. Reinsurers' insist that the Second Circuit "failed even to consider or address" the relevant law of the case precedents. USR Pet. at 21. It is beyond dispute, however, that the Second Circuit reached its conclusion by applying *Christianson* and other well-recognized precedent from this Court. Once again, the core of the U.S. Reinsurers' complaint is that the Second Circuit misapplied the law of the case doctrine here, not that the Second

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[6] The U.S. Reinsurers assert that the district court's original consolidation order caused them "prejudice." USR Pet. at 11. The U.S. Reinsurers, however, offer no support for their vague assertion of prejudice and the record clearly indicates that consolidation had no adverse effect on them. The U.S. Reinsurers selected one of the panel members (as was their right under the arbitration agreement), took extensive discovery, submitted a pre-hearing brief with exhibits, and participated fully in the arbitration hearing itself. (A618-21). In other words, the U.S. Reinsurers proceeded in the consolidated arbitration as they would have in a separate, unconsolidated arbitration. Moreover, the U.S. Reinsurers cannot complain that consolidation with the London Reinsurers' arbitration increased the cost of the arbitration because they voluntarily participated in the discovery taken from the London Reinsurers and even demanded discovery from reinsurers who were not parties to the arbitration. (A619-20).

In their arguments to the Second Circuit, the U.S. Reinsurers asserted that they were prejudiced by the consolidated arbitration because the proceedings took longer and were more expensive due to there being more parties. Yet the relief the Reinsurers seek, separate arbitrations *de novo*, would only compound the time and cost of the proceedings.

Circuit misstated the doctrine itself.[2/] As noted above, *see supra* at 10-11, 13-14, this Court will usually refuse to grant certiorari where, as here, the petitioner has asserted that the court of appeals erred in applying a properly stated rule of law. Sup. Ct. R. 10.

C. The Second Circuit's Analysis of Section 10(a)(4) of the Federal Arbitration Act Does Not Affect a District Court's Powers or Conflict with any Applicable Precedent

The U.S. Reinsurers' final attempt at finding a conflict between the Second Circuit's decision and precedent centers on the Second Circuit's two-line reference to section 10(a)(4) of the FAA, which provides that a court may vacate an arbitration award "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). In response to the Reinsurers' argument that the District Court properly vacated the award pursuant to section 10(a)(4), the Second Circuit stated that "section 10 does not provide an independent means of challenging the district court's order compelling a consolidated arbitration which was appealable, but which was not appealed." (Pet. App., 12a n.3). This statement, the U.S. Reinsurers contend, effectively "nullifies" the power of a district court to vacate arbitration awards whenever the arbitrators have exceeded their powers, USR Pet. at 17, and conflicts with precedent regarding section 10(a)(4), USR Pet. at 18.

[2/] The U.S. Reinsurers admit as much when they refer to the Second Circuit's "misapplication of the law of the case doctrine." USR Pet. at 18.

The U.S. Reinsurers, however, again misinterpret the Second Circuit's decision. The Second Circuit expressed no opinion as to the general power of a district court to vacate an award under section 10(a)(4) where the arbitrators have exceeded their powers. Rather, it merely said that under the unique circumstances of this case section 10(a)(4) could not be used as an independent basis for departing from the law of the case doctrine and reversing the earlier order of consolidation. The Second Circuit's decision, therefore, in no way limits a district court's ability to vacate an award if it finds that the arbitrators exceeded their powers. Since the question now raised by the U.S. Reinsurers in their petition was not presented by the unusual circumstances of this case and, accordingly, was never even reached by the Second Circuit, there can be no conflict between the Second Circuit's decision and the cases construing section 10(a)(4).

POINT II

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW PRESENTED HERE THAT SHOULD BE SETTLED BY THIS COURT

In an attempt to provide an alternative grounds for granting certiorari, the U.S. Reinsurers argue that this Court should review the Second Circuit's decision so that it may settle the wholly tangential issue of when an order compelling arbitration is appealable. They claim that the prevailing test, which examines whether the order arises in an "independent" or an "embedded" proceeding, has

created recurring confusion and led to inconsistent results.[9/]

The case law, however, does not support the U.S. Reinsurers' contentions. The overwhelming majority of circuits have adopted the independent-embedded standard. *See, e.g., Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 61 (1995); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994); *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 667-68 (5th Cir.), *reh'g and reh'g in banc denied*, 21 F.3d 1110, *cert. denied*, ___ U.S. ___, 115 S. Ct. 195 (1994); *Humphrey v. Prudential Sec., Inc.*, 4 F.3d 313, 317-18 (4th Cir. 1993); *McDermott Int'l v. Underwriters at Lloyds*, 981 F.2d 744, 747-48 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2442 (1993); *Filanto*, 984 F.2d at 60-61; *Perera v. Siegel Trading Co.*, 951 F.2d 780, 783-86 (7th Cir. 1992); *Seguro de Servicio de Salud de Puerto Rico v. McAuto Sys. Group, Inc.*, 878 F.2d 5, 7 n.3 (1st Cir. 1989); *Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) (per curiam); *Zosky v.*

[9/] The Second Circuit recently described the independent-embedded test for appealability in *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58 (2d Cir. 1993). It noted that an order compelling arbitration is immediately appealable if an action is "'independent,' *i.e.*, the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or is not arbitrable," and no party seeks any other relief regarding the *merits* of the dispute. Such an order, however, is not immediately appealable if an action is "embedded," *i.e.*, a party seeks some relief on the merits of the dispute in addition to an order requiring or prohibiting arbitration. *Id.* at 60.

Boyer, 856 F.2d 554, 558-59 (3d Cir. 1988), *reh'g and reh'g in banc denied*, 856 F.2d 554 (3d Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989).[2]

The independent-embedded distinction has been adopted precisely because it is a bright-line test yielding consistent results. *See Gammaro*, 15 F.3d at 96 (describing the standard as a "bright-line rule" that avoids "a more attenuated, case-by-case determination of jurisdiction"); *Zosky*, 856 F.2d at 560 (noting that the independent-embedded standard "serves the purposes of preventing piecemeal appeals"); Edith H. Jones, *Appeals Out of Arbitration Orders -- Coming Out of the Serbonian Bog*, 31 S. Tex. L. Rev. 361, 376, 379 (1990) (describing independent-embedded test and current rules governing appealability as "comprehensive, easy to understand, and readily available to the average practitioner"). Indeed, the independent-embedded standard is such a useful test that it was codified in the 1988 amendments to the FAA. *See Gammaro*, 15 F.3d at 96 (noting that Congress intended to codify the independent-embedded distinction in the 1988 amendments); *Filanto*, 984 F.2d at 60 ("Congress built upon the distinction the courts had previously recognized between so-called 'independent' proceedings and so-called 'embedded' proceedings . . . ."); *Perera*, 951 F.2d at 783 ("[A]s for decisions favoring arbitrations, the statute codifies the judicial distinction that existed prior to the enactment of the 1988 amendments . . . .").

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[2] It should be noted that in four of the foregoing cases applying the independent-embedded test, *Prudential Insurance*, *Sphere Drake Insurance*, *McDermott* and *Zosky*, this Court declined to grant certiorari.

The cases cited by the U.S. Reinsurers do not demonstrate, as the U.S. Reinsurers claim, that the independent-embedded distinction is "opaque" and leads to inconsistent results. USR Pet. at 12. Those cases instead illustrate that the independent-embedded test is easy to apply and promotes a consistency of results, even in varied situations. *See American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 137 (4th Cir. 1994) (dismissing appeal from order arising in embedded proceeding where party sought "separate declaratory relief" regarding the merits in addition to a determination of arbitrability); *Adair Bus Sales*, 25 F.3d at 955 (dismissing appeal from order arising in embedded proceeding where "relief other than arbitrability [was] sought"); *Gammaro*, 15 F.3d at 95 (noting that the application of the independent-embedded distinction "is rather straightforward" and dismissing appeal from order arising in embedded proceeding where one party sought relief other than a determination of arbitrability); *Corion Corp. v. Chen*, 964 F.2d 55, 58 (1st Cir. 1992) (dismissing appeal from order arising in embedded proceeding where party "did not ask the court to decide only arbitrability"); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 359 (11th Cir. 1989) (dismissing appeal from order arising in embedded proceeding where one party sought relief other than a determination of arbitrability).[10/] Thus, there has been no

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[10/] The only case cited by the U.S. Reinsurers with a seemingly inconsistent result is *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1273-76 (6th Cir. 1990), where the court held that an order to compel could be appealed even though it arose in an embedded proceeding. The U.S. Reinsurers' reliance on *Arnold*, however, is seriously misplaced because in that case the Sixth Circuit refused to adopt the

(continued...)

confusion or inconsistency in the application of the independent-embedded distinction.

Moreover, even if the independent-embedded standard were producing confusion or inconsistent results, there are two additional reasons why this Court should not grant certiorari. First, in this case it was clear that the District Court's July 1991 Order arose in an independent proceeding and was immediately appealable. As the Second Circuit noted:

> The case before us fits squarely within the definition of an "independent" proceeding. North River initiated this action under Sections 4 and 5 of the FAA, asking the district court to compel arbitration in its disputes with the U.S. and London reinsurers. No other relief was sought.[11/]

[10/](...continued)
independent-embedded standard. *See* 920 F.2d at 1276. *Arnold*, therefore, is simply not relevant to the U.S. Reinsurers' claim.

[11/] In seeking an order compelling arbitration, North River also asked the District Court to consolidate the arbitrations and appoint an umpire. As the Second Circuit recognized, such procedural relief is ancillary to an order compelling arbitration and did not make the proceeding in the District Court an "embedded" proceeding. Under *Filanto* and the other cases describing the independent-embedded standard, a proceeding is embedded only when a party seeks substantive relief on the merits of the dispute. *See supra* at 19-20. Here, neither party sought any relief on the merits.

(Pet. App., 6a-7a). This case, in other words, is not an appropriate vehicle for evaluating the independent-embedded test.

Second, because Congress intentionally preserved the independent-embedded standard when it amended the FAA in 1988, it is for Congress to change the law. *See Stedor Enters. Ltd. v. Armtex, Inc.*, 947 F.2d 727, 732 (4th Cir. 1991) (stating that only Congress, not the courts, may change the law regarding the appealability of orders compelling arbitration); 4 Ian R. MacNeil, *et al.*, *Federal Arbitration Law* § 43.2.5 at 43:40 (1995) (noting that "[g]iven the legislative history of FAA § 16," there is no "truly adequate cure" for any perceived problems except through congressional action). This Court, therefore, should not review the Second Circuit's decision based on the U.S. Reinsurers' claim that the prevailing test for the appealability of orders compelling arbitration is somehow deficient.

CONCLUSION

For the foregoing reasons, the petitions of the U.S. and London Reinsurers for a writ of certiorari should be denied.

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New York, New York

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